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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS ON THE JURISDICTIONAL ISSUES

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BRIEF OF RESPONDENTS ON THE JURISDICTIONAL ISSUES

This Brief is filed pursuant to the Court's request of April 2, 1974, that Supplemental Briefs be filed on the issues of:

1. The Jurisdiction of the District Courts.
2. Exhaustion of remedies and,
3. The propriety of a Federal District Court enjoining a pending Court-martial proceedings.

This Brief is in response to the Brief of Petitioners herein on these issues alone.

The Court has previously granted certiorari and ordered Briefs be filed on the merits. To date, Petitioners herein have not filed a Brief on the merits.

STATEMENT

For the purpose of this Brief, Respondents concur with the statement set out in Petitioners' Brief on the Jurisdictional Issues under the headings *OPINIONS BELOW*, *JURISDICTION* and *STATEMENT*.

SUMMARY OF ARGUMENT

The case now before the Court, as did *O'Callahan v. Parker* 395 US 258, 23 L. Ed. 2nd 291 89 S. Ct. 1683 and *Relford v. Commandant* 401 US 355 28 L. Ed. 2nd 102 91 S. Ct. 649, falls within the area of stress between the Guarantees contained in Article III, Section 2, Cl. 3 of the Constitution, in the Fifth and Sixth Amendments on the one hand, and on the other, the power vested in Congress in Article I, Section 8, Cl. 14, of the Constitution "to make rules for the Government and regulation of the land and naval Forces", with its supportive necessary and proper provisions in Clause 18, and the Fifth Amendment's correlative exception for "cases arising in the land or Naval Forces".

Petitioners Brief on the Jurisdictional Issues properly and persuasively argues that when a Court Martial has jurisdiction to hear a matter coming within the purview of the Constitutionally authorized scope of Military authority, a Civilian Court does not have the power to limit or affect the mission of the Military Court and further that if a matter is properly under the authority of the Military Court, the accused should pursue his remedies in the Military Court system. We strongly disagree, however, that the case now before the Court was ever properly within the purview of the type of case which could be tried by Military Courts in the first place. We would further assert that Respondent properly applied to the District Court to claim his Constitutional right under Article III and the Fifth and Sixth Amendments. We would urge the Court that the Military does not have the power to try an individual by Court-Martial simply because the individual at the time of the alleged offense and Court-Martial was on active duty with the Army.

ARGUMENT

PROPOSITION I

THE DISTRICT COURT PROPERLY ENJOINED THE COURT MARTIAL PROCEEDING.

A. *The District Court Has Jurisdiction To Insure That The Rights Of Individuals Guaranteed Under The U.S. Constitution Are Protected.*

The U.S. Constitution, in Article III, Section 2, Cl. 3, provides that:

> "TRIAL BY JURY — The trial of all crimes, except in cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by Law have directed".

The Sixth Amendment provides:

> "RIGHTS OF THE ACCUSED — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".

The Fifth Amendment provides:

> "CRIMINAL ACTIONS — PROVISIONS CONCERNING — DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES. No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Respondent herein, Bruce R. Councilman, found himself in a position about to be deprived of these Constitutional rights guaranteed to all citizens. When a Plaintiff in good faith, asserts a right which is predicated upon the provisions of the Constitution, and that right may well be recognized if the Constitution is given a certain construction, then there is a substantial federal question. 1/ This general Rule applies to Rights asserted by servicemen against their superiors or against other supervisory personnel. 2/ In the instant case, there can be little doubt that respondent has asserted a most serious Constitutional claim, the resolution of which turns upon a delicate application of this Court's prior holdings in *O'Callahan vs. Parker*, and *Relford v. Commandant*, Supra.

Respondent herein bases his claim that the Federal District Court has jurisdiction under the provisions of 28 USC, Section 1331, which gives District Courts jurisdiction of all Civil actions, where the matter in controversy exceeds "$10,000.00 and arises under the Constitution, laws or treaties of the United States". Since the Respondent is claiming that the actions of the Military violate substantially his Constitutional rights

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1/ See *Martinez v. Southern Ute Tribe*, 273 F. 2d. 731, (Fifth Circuit 1960).

2/ See *Harmon v. Brucker*, 355 US 579 78 S. Ct. 433, 2L. E. 2d. 503 (1958); *Reed v. Franke*, 279 F. 2d. 17 (Fourth Cir. 1961)

as above set out, this claim clearly raises a Federal question. The Petitioner has not contested the fact that the sum of $10,000.00 was involved. Accordingly, no actual proof on this matter was submitted to the District Court. In any event, it is clear that a substantial Federal question has been raised and that the matter in controversy does exceed the value of $10,000.00. 3/

It has been asserted in Petitioner's Brief on the Jurisdictional Issues that Civilian Court have jurisdiction to review Court-martial proceedings involving Military personnel only by writ of Habeas Corpus under the provisions of Article 76 of the Uniform Code of Military Justice, 10 USC 876. We would certainly agree that Civilian Courts do have the jurisdiction to review Courts-martial by Habeas Corpus. We would disagree, however, with the statement that there is no constitutional basis for other remedies, even when the accused is not imprisoned. To so hold would be to say that a military person is deprived of the Constitutional Rights guaranteed to all citizens and must suffer military imprisonment, with its attendant scars both personal and professional, *before* the rules regarding "service connection" established by this Court may even be raised.

The crux of the matter is whether there is sufficient "service connection" in the first place. If the question be answered in the affirmative then the accused should be required to stand trial before the Military Court. If the question be answered in the negative then the Military Court has no jurisdiction to try the accused at all. Resolving this question goes to the merits of the case which we would urge this Court to consider.

B. *In Resolving A Conflict Between The Rights Of Individuals, Guaranteed Under Article III, Section 2,*

3/ Moreover, even if there be a jurisdictional amount attack we would assert that jurisdiction does lie. See *Murray v. Vaughn,* 300 F. Supp. 688 (D.R.I. 1969)

Cl. 3, The Sixth Amendment, And The Fifth Amendment On The One Hand And Article 1, Section 8, Cl. 14 On The Other, The Court Should Resolve The Conflict In Favor Of Individual Rights And Against The Expansion Of Military Authority Beyond Its Proper Domain.

The conflict between the rights of an individual under Article III of the Constitution and the Bill Of Rights on the one hand and the power of the Military deriving its authority from Article I of the Constitution on the other hand, has been considered by this Court before. The language in *Toth v. Quarles* 350 U.S. 11, 17-18, 100 L. Ed. 8, 14, 15, 76 S. Ct. 1, was quoted extensively in the O'Callahan decision, and points out some of the salient differences between military and civilian Courts:

> "We find nothing in the history of constitutional treatment of Military Tribunals which entitles them to rank along with Article III Courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike Courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to Military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in Federal Courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials.

They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

Moreover, there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in Federal Courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury."

Determining the scope of the Constitutional power of Congress to authorize trial by Court-Martial presents another instance calling for limitation to *"the least possible power adequate to the end proposed"*. (Emphasis supplied)

Justice Douglas, delivering the opinion in O'Callahan, has further pointed out some of the differences between Courts-martial and Article III Courts:

"A Court-martial is tried, not by a Defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are pro-

tected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to elimniate the danger.

A Court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. The justification for such a system rests on the special needs of the military and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, e. g., Burns v. Wilson, 346 US 137, 97 L Ed 1508, 73 S Ct 1045, but in examining the reach of their jurisdiction, it has recognized that

'there are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free Countries of the World have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service' . . .

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . .

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.

As recently stated: 'None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument discipline, not justice'. Classer, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1960).

The mere fact that Petitioner was at the time of his offense and of his court-martial on active duty in the Armed Forces does not automatically dispose of this case under our prior decisions."

PROPOSITION II

THE SUPREME COURT SHOULD DECIDE THIS CASE ON THE MERITS.

The lower Federal Courts have treated cases involving drug use by servicemen differently than have the Military Courts.

The United States Military Court of Appeals has marked several definite areas in which military jurisdiction would be maintained, O'Callahan notwithstanding. 4/ Those areas are summarized as: (1) Crimes on Base or on a Military Reservation (2) Crimes where the victim was another serviceman (3) Crimes overseas

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4/ *Wilberding, The Supreme Court Adds New Guide Lines on "Service Connection" in Determining Court Martial Jurisdiction, 1971, Washington U.L.Q. 413.*

(4) Crimes where military status was relied upon or exploited (5) narcotics or drug offenses (6) national defense matters and, (7) petty offenses. In a leading marijuana case, *U. S. vs. Beeker,* 18 U.S.C.M.A. 563, 40 CMR 275 (1969) the accused was convicted of wrongful use and possession of marijuana while off duty, and off post. Military jurisdiction was sustained by the Military Court. In *U. S. vs. Rose,* 18 U.S.C.M.A. 3, 41 CMR 3 (1969) the sale of barbiturates between servicemen while off post and off duty was held to be service connected.

The lower Federal Courts, on the other hand, have been inclined to give greater weight to the Constitutional rights of the individual, rather than to expand the power of the Military. In *Moylan v. Laird,* 305 F. Supp 551 (D.R.I. 1969) the Court held that off-base possession of marijuana was not sufficiently service connected to support military Court jurisdiction. In *Moylan,* the Court relied on the language of *Noyd v. Bond,* 395 US 683 (1969) to explain the departure from the usual exhaustion rules:

> "We did so . . . because we did not believe that the expertise of military courts extended to the consideration of Constitutional claims of the type presented. *Moreover, it appears especially unfair to require exhaustion of military remedies, when the complainants raised substantial arguments denying the right of the military to try them at all."*
> (emphasis supplied)

The same reasoning was apparent in *Schroth v. Warner,* 353 F. Supp 1032 (D. Hawaii 1973) in which the Court held that a serviceman who was charged with off-base possession of marijuana and certain drugs and off-base transfer of marijuana and on-base transfer of another controlled substance was entitled to an injunction against prosecution on such charges by Military Court-Martial.

In *Cole v. Laird*, 495 F. 2d 829 (1972) a serviceman was convicted by a Court-martial for the unlawful use of marijuana. He Petitioned the Federal Courts for injunctive relief on the ground that the Court-martial was without jurisdiction to try him for the offense. The Fifth Circuit Court of Appeals held that since the Petitioner serviceman was off-post, off-duty and in civilian clothes at the time of the alleged offense, the Constitutional requirement of "service connection" was not present and the Military had no authority to try him by Court-martial.

The Supreme Court should decide this matter on the merits and give both the Lower Federal Courts and the Military Courts direction as to the proper treatment in this area.

CONCLUSION

It is therefore respectfully submitted that the Court hear this case on the merits and that the judgment of the Court of Appeals be affirmed.

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